Goad Company *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO and Steamfitters' Local Union No. 420 of Philadelphia and Greater Delaware Valley. Cases 14–CA–25782(E) and 14–CA–25793(E)

October 1, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On June 29, 2001, Administrative Law Judge George Carson II issued the attached supplemental decision. The applicant filed exceptions and a supporting brief. The General Counsel and the Charging Parties each filed answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the application is denied.

Dated, Washington, D.C. October 1, 2001

Peter J. Hurtgen,	Chairman
Wilma B. Liebman,	Member
John C. Truesdale,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Paula B. Givens, Esq., for the General Counsel.
Mark W. Weisman, Esq., for the Respondent.
Dinah S. Leventhal Esq., for the Charging Parties.

SUPPLEMENTAL DECISION

EQUAL ACCESS TO JUSTICE ACT

STATEMENT OF THE CASE

George Carson II, Administrative Law Judge. Pursuant to the Equal Access to Justice Act (EAJA) Pub. L. 96-481, 94 Stat. 2325, 5 U.S.C. Sec. 504, and Sec. 102.143 of the Board's Rules and Regulations, the Respondent timely filed an application for fees and other expenses in this matter on April 24, 2001. The application was accompanied by a motion to withhold confidential financial information from public disclosure.[1] On April 24, 2001, the Board referred the application to me for appropriate action. As the prevailing party in *Goad Co.*, 333 NLRB No. 82 (2001), the Respondent contends in its application that the General Counsel's position was not substantially justified.

On May 25, 2001, Counsel for the General Counsel filed an answer with an accompanying memorandum denying the contention that the position of the General Counsel was not substantially justified, and Counsel for the Charging Parties filed comments in opposition to the application of the Respondent. On June 19, 2001, the Respondent filed a reply to the answer of the General Counsel with an accompanying memorandum.

The EAJA provides that attorney fees may be awarded to eligible parties who prevail in cases tried before administrative agencies, unless the Government establishes that its litigation position was "substantially justified." The Supreme Court, in *Pierce v. Underwood*, 487 U.S. 552 (1988), stated that "substantially justified" means "justified to a degree that could satisfy a reasonable person" or as having a "reasonable basis both in fact and law." The Board, in *Indianapolis Mack Sales*, 292 NLRB 136 fn. 1 (1988), noted that the administrative law judge's discussion of the substantial justification issue in that case fully comported with the Court's definition. In *Indianapolis Mack Sales*, the administrative law judge cited a portion of the legislative history of the EAJA noting the following:

> The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show [that] its case had a reasonable basis [both] in law and fact, no award will be made.
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> . . . .
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> The standard, however, should not be read to raise a presumption that the Government position was not substantially justified simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing.

H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980). Id. at 136.

I BACKGROUND

Before addressing whether the General Counsel acted with substantial justification in this case, a brief summary of the underlying proceeding is appropriate. On June 24, 1998, the United Association informed Respondent's President Curtis

[1] The confidential financial information is sealed and attached to the Respondent's application as Exhibit A. An itemization of fees and expenses is attached as Exhibit B. The charges reflected therein exceed the $75 per hour prescribed by Sec. 102.145(b) of the Board's Rules and Regulations. The Respondent's application and attachments reflect that the Respondent is also seeking fees and expenses in connection with a Sec. 10(j) proceeding that was filed in this matter. I had no involvement with that proceeding which was before the United States District Court, not the Board.

Goad that, effective July 1, 1998, jurisdiction of Respondent's facilities was being transferred from Local 420 to Local 562. Goad objected and refused to bargain with Local 562. This refusal to bargain was the subject of unfair labor practice charges filled by the United Association and Local 562. Those charges were dismissed since there was not a "continuity of representation." Thereafter, on August 4, 1999, the Business Manager of Local 420, Joseph Rafferty, wrote Goad stating that Local 420 was exercising its right to reopen the collective-bargaining agreement between the parties that was to expire on October 20, 1999, and that a representative of Local 420 would "meet and confer" with him regarding the new contract. On October 8, Rafferty, in a letter, identified Daniel P. Murphy as "Local 420's agent for the purposes of negotiating and servicing a new contract with the Goad Company." On October 12, 1999, Goad wrote Rafferty stating that he had not been contacted by a representative of "your union, " but that he had "been contacted by a representative of Pipefitters' Local 562 in St. Louis. As you are aware, the National Labor Relations Board ruled that there is no obligation to bargain with Local 562." In a postscript, Goad offered to meet with "anyone other than Local 562," that for over a year and a half "we have informed you that we do not want to deal with Local 562." The Respondent persisted in its refusal to deal with Murphy or Local 562, and the United Association and Local 420 filed the charges that were the subject of *Goad Co.*, supra.

II DISCUSSION

The complaint alleged that the Respondent violated the Act by failing and refusing to bargain with Local Union No. 420 unless Daniel P. Murphy ceased to act as the Union's agent. Evidence presented at the hearing included exchanges of correspondence, testimony relating to various telephone conversations, and an internal union agreement providing for designation of "one or more Business Agents for Local 562 . . . to serve as Local 420's agent(s)." The General Counsel and the Charging Party cited longstanding Board precedent regarding the right of employers and unions to appoint agents to negotiate and my decision sets out such precedent noting that "[e]mployers and unions have the right 'to choose whomever they wish to represent them in formal labor negotiations.' *General Electric Co. v. NLRB*, 412 F.2d 512, 516 (2d Cir. 1969)." *Goad Co.*, supra. The Charging Party, citing *Fitzsimons Mfg. Co.*, 251 NLRB 375, 379 (1980), notes that a party must deal with the chosen representatives who appear at the bargaining table except in the rare circumstance when the "the presence of a particular representative . . . makes collective bargaining impossible or futile." See also *R.E.C. Corp.*, 307 NLRB 330, 333 (1992). It was undisputed that Goad refused to bargain with Murphy. Goad's letter of October 12, 1999, does not even dignify Murphy by referring to him by his name but refers to him as "a representative of Pipefitters' Local 562."

Notwithstanding the foregoing precedent, on the basis of the particular facts and circumstances of this case, I concluded, and the Board agreed, that "Local 420 did not simply enlist the aid of an agent, but transferred its representational responsibilities to Local 562." *Goad Co.*, supra at fn. 1. The Respondent notes that Counsel for the General Counsel, in the memorandum accompanying the answer to the application, continues to argue that the internal agreement operated to appoint Local 562 as an agent and that I rejected this argument in my decision. My rejection of the General Counsel's argument does not establish that the General Counsel's position was not substantially justified. The General Counsel argues that the position of the government was substantially justified, and I agree. The evidence presented by the General Counsel established a prima facie case both on the facts and the law. The Respondent had not repudiated its bargaining obligation and had specifically stated that it was willing to meet with "anyone other than Local 562."

The Respondent, in its application, argues that the internal agreement entered into between Local 420 and Local 562, was a "sham intended to convey representation rights from Local 420 to . . . Local 562," and, in the memorandum accompanying its reply, the Respondent asserts that "there was no justification to proceed to hearing once the Agreement became known to the Regional Office." In order to find that the General Counsel proceeded without substantial justification, I would have to find that the General Counsel possessed "evidence that *clearly* would defeat an allegation that the charged party has violated the law." (Emphasis added.) *Lion Uniform*, 285 NLRB 249, 254 at fn. 33 (1987). Contrary to the Respondent's argument, the internal agreement standing alone was not dispositive of the case. My decision specifically notes that the internal agreement did "not contain words specifically substituting Local 562 for Local 420," and I, therefore, addressed the practical effect of the agreement. *Goad Co.*, supra at slip op 2. The first sentence in the first numbered provision of the internal agreement states that "one or more Business Agents for Local 562 will be designated to serve as Local 420's agent(s) for the purpose of negotiating and servicing a new contract with the Goad Company which will be entered into in the name of Local 420." Notwithstanding this statement, I found that "the practical effect of the agreement was to substitute Local 562 as the collective bargaining representative in place of local 420." That finding was not based upon a finding relating to the document standing alone, but upon consideration of all of the record evidence.

Although this case did not turn upon credibility in the classic sense, Counsel for the General Counsel correctly points out that I failed to credit certain portions of Rafferty's testimony, including his denial that he contemplated that he was "giving away to Local 562 Local 420's rights, duties and responsibilities as the collective bargaining representative of Goad's employees" and his assertion that he would make the decisions regarding taking grievances to arbitration. I did not cite the foregoing testimony in the decision because I gave no credence to it. Rafferty's denial to Counsel's carefully phrased question regarding giving away Local 420's rights was conclusory. No document reflected any agreement relating to arbitration, and I placed no reliance upon Rafferty's assertion that it was "understood" that he would make such decisions. The Respondent argues that the foregoing was "self-serving irrelevant testimony" upon which I did not rely. The Respondent is correct that I did not rely upon that testimony; however, my disregard of this conclusory and uncorroborated testimony did constitute a credibility resolution. See *Nyeholt Steel, Inc.*, 323 NLRB 436, 437 (1997). If I had credited, and placed great weight upon,

Rafferty's testimony that Local 420 would, prospectively, be involved in arbitration decisions and that he had not contemplated that he was giving away Local 420's "rights, duties, and responsibilities," and if I had given controlling weight to the first sentence in the first numbered provision of the internal agreement providing for the appointment of business agents of Local 592 "to serve as Local 420's agent(s)," I would, consistent with the argument of the General Counsel, have found that "no representational 'responsibilities' had been transferred by Local 420" and that Local 420 had simply appointed an agent. Instead, I placed far more weight upon Rafferty's admission that, in a telephone conversation with Goad on October 8, he told Goad, "Murphy is the guy we're going to . . . I'm not partaking in it." *Goad Co.*, supra at slip op. 3.

III CONCLUDING FINDINGS

My determination that the Respondent did not violate the Act was reached after consideration and analysis of the particular facts and circumstances of this case as presented in the entire record. The General Counsel was fully justified in proceeding against this Respondent that couched its refusal to bargain in terms of objections to Murphy as a representative of Local 562 but had expressed willingness to negotiate with "anyone other than Local 562." Although I found no violation of the Act, my decision was predicated upon placing more weight upon particular portions of testimony, ascribing more significance to some facts than to others, and drawing inferences from that testimony and those facts. The Board has held that "[s]uch weighing of facts and drawing of inferences is not the General Counsel's province in the investigative stage of a proceeding. The weighing of various explanations . . . and the drawing of inferences from the testimony are, in the first instance, the exclusive province of the judge; they require submission of the case to the fact finding process of litigation." *Lathers Local 46 (Building Contractors)*, 289 NLRB 505, 508 (1988). I denied the Respondent's motion to dismiss at the conclusion of the General Counsel's case stating that the General Counsel had presented a prima facie case, and I did not issue a bench decision. It was only after the record had been fully developed, the entire record had been analyzed, legal research had been accomplished, and the arguments of all parties fully considered that I concluded that the evidence established that Local 420 had transferred its representational responsibilities.

I find and conclude that the General Counsel's prosecution of this case had a reasonable basis on the facts and the law and that it was substantially justified. In view of this, I shall recommend that the Respondent's application for an award of fees and expenses be denied.[2]

ORDER

The Respondent's application for award of fees and expenses is denied.[3]

Dated, Washington, D.C. June 29, 2001.

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[2] In view of the foregoing, it is not necessary to address any other issues, including the amount of any award, the eligibility of the Respondent for an award, and the Respondent's motion to withhold confidential financial information. The financial data submitted by the Respondent shall remain under seal pending the outcome of this matter.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.